

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

PRO-SPEC PAINTING, INC.

EMPLOYER

AND

Case 6-RC-12209

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, DISTRICT COUNCIL 57 OF
WESTERN PA, AFL-CIO, CLC

PETITIONER

ACTING REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer, Pro-Spec Painting, Inc., is a painting contractor in the construction industry with its principal place of business in Vineland, New Jersey and a jobsite in Forest County, Pennsylvania. The Petitioner, International Union of Painters and Allied Trades, District Council 57 of Western PA, AFL-CIO, CLC, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking a self-determination election in a unit of all full-time and regular part-time painters employed by the Employer in a 29-county area whereby the petitioned-for painters would vote whether they wish to be included together with an already certified unit of painters in a three-county area. The scope of the unit, if certified, would then be coextensive with the Petitioner's 32-county geographic jurisdiction. Hearing officers of the Board held hearings¹ and the parties argued their positions orally on the record.

¹ The hearing in this matter opened and closed on March 19, 2003. Thereafter, the Petitioner filed a Motion to Reopen the Record, which was granted. Accordingly, the resumed hearing opened and closed on April 4, 2003.

As evidenced at the hearing, the parties disagree on the following three issues:

- 1) The scope of the unit: whether the petitioned-for 32-county unit is appropriate or whether the unit must be limited to the Forest County State Correctional Institute (Forest County SCI) project.
- 2) If the petitioned-for 32-county unit is appropriate, whether the Project Labor Agreement covering the Forest County SCI project operates as a contract bar.
- 3) Whether the petition should be dismissed on the ground that the Forest County SCI project is nearly completed and the Employer has no other work in the petitioned-for geographic area.

As mentioned above, the Petitioner is presently the certified bargaining representative for all full-time and regular part-time painters employed by the Employer in Allegheny, Fayette and Washington Counties in Pennsylvania, having been certified on March 14, 2001, in Case 6-RC-11916. By this petition, the Petitioner seeks a self-determination election for all full-time and regular part-time painters employed by the Employer in 29 other counties² located in Western and Central Pennsylvania, to vote on whether to be included with the three-county certified unit.

The Employer contends that the scope of the unit must be limited to its Forest County SCI project. At present, this is the only on-going project the Employer is performing in the 32-county area. It is subject to a Project Labor Agreement, which will expire upon completion of the project. In these circumstances, the Employer contends that the petition should be deemed as a request to convert a Section 8(f) pre-hire agreement (the Project Labor Agreement) into a Section 9(a) relationship. The Employer also argues that the scope of the unit must be limited

² Erie, Crawford, Warren, McKean, Potter, Mercer, Venango, Lawrence, Butler, Beaver, Greene, Westmoreland, Somerset, Bedford, Fulton, Indiana, Cambria, Blair, Huntingdon, Juniata, Mifflin, Centre, Armstrong, Clarion, Jefferson, Clearfield, Forest, Elk and Cameron. These 29 counties, together with Allegheny, Fayette and Washington Counties, comprise the Petitioner's 32-county geographic jurisdiction.

to the Forest County SCI project because it is the only on-going project the Employer has in the petitioned-for geographic area.

In the alternative, the Employer contends that if the unit is not limited to the Forest County SCI project, then the Project Labor Agreement operates as a contract bar as to the Forest County SCI employees.

Finally, the Employer contends, and so moved at the hearing, that the Petition should be dismissed in that the Forest County SCI project will be completed by the end of April 2003, and the Employer has no other work in the petitioned-for counties.

In response, the Petitioner contends that the petitioned-for 32-county unit is appropriate in that the Employer has performed three substantial projects in the area, manned with painters from the area. Specifically, the Petitioner notes that when working on the PNC Park project in Allegheny County, the Employer had, pursuant to a Project Labor Agreement, hired 90 percent of its employees from the Petitioner's non-exclusive hiring hall.³ Further, when working on the Fayette County State Correctional Institute (Fayette County SCI) project in Fayette County, the Employer had hired five of the Petitioner's members. In addition, at the Forest County SCI project, the Employer hired its employees from the Petitioner's hiring hall under a Project Labor Agreement and employees working at the project were from Warren, Armstrong, Indiana, Elk, Mercer, Westmoreland and Clarion Counties. On this basis, the Petitioner argues that the Employer has had a "bargaining" relationship with the Petitioner, which has, at least potentially, covered painters in the 32-county petitioned-for area.

The Petitioner further contends that the Forest County SCI Project Labor Agreement does not prohibit covered employees from voting on whether to be included as part of another unit.

³ Under the Project Labor Agreement, the Employer could hire the first and third employees as core employees without utilizing the Petitioner's hiring hall, or could directly hire up to 10 percent of the workforce, whichever was greater.

As to the issue of the Employer's future work, the Petitioner contends that as of March 24, 2003, there were still 173 days of work remaining at the Forest County SCI project and that the end of April completion date relied upon by the Employer is no more realistic than past deadlines that were not met. The Petitioner further contends that it is likely the Employer will also be awarded other work on the project. Finally, the Petitioner contends that the history of the warranty work at the Fayette County SCI, also performed by the Employer, indicates that there is likely to be substantial work performed at the Forest County SCI under the Employer's one-year warranty.

I have considered the evidence and the arguments presented by the parties on each of these issues. As discussed below, I have concluded that the Forest County SCI project will be completed shortly, that a determination of the warranty work, if any, that will need to be performed would be speculative, and that the Employer has no other projects in the 32-county area. In these circumstances, no useful purpose would be served by conducting an election herein. Accordingly, I have ordered that the petition be dismissed. Because I have concluded that the petition must be dismissed, I have not reached the other issues raised by the parties.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that support my conclusion.

I. OVERVIEW OF OPERATIONS

The Employer is a painting contractor in the construction industry, working on large commercial/public projects. The Employer is a New Jersey corporation with its principal place of business located in Vineland, New Jersey. At present, the Employer's projects are a sports arena located in San Antonio, Texas; a project located in Omaha, Nebraska; and a state prison located in Forest County, Pennsylvania. Projects recently completed by the Employer include a high-rise laboratory building in Austin, Texas; a small job in Vineland, New Jersey; a football stadium in Cincinnati, Ohio; a football stadium in Baltimore, Maryland; a baseball stadium in

Houston, Texas; a waste treatment plant in Ocean County, New Jersey; a convention center in Ocean City, Maryland; the PNC Park baseball stadium in Pittsburgh, Pennsylvania and a state prison in Fayette County, Pennsylvania. In general, the Employer hires employees at each separate location.⁴

The overall operations of the Employer are the responsibility of its President, Ronald Yarbrough. At the Forest County SCI project are two supervisors: John Tokatch and Dan Brandonio.⁵

II. EMPLOYER'S WORK IN THE 32-COUNTY AREA

The Employer has performed three projects in the 32-county area: PNC Park in Allegheny County, the Fayette County SCI in Fayette County and the Forest County SCI in Forest County. Both the PNC Park and the Fayette County SCI projects have been completed.⁶ The status of the Forest County SCI project is disputed and is discussed below in greater detail.

Other than work related to the Forest County SCI project, within the 32-county area, the Employer has no current bids pending,⁷ is not working on any bids to submit, has no work that is under contract but not yet started, and has no work that it is negotiating with an owner or another contractor to perform. The Employer's President testified that he was not aware of any large commercial/public projects of the type the Employer usually performs arising in the future in the 32-county area, and the record contains no evidence of any such jobs.

⁴ On occasion, a former employee may contact the Employer to ask about work, and will be told about upcoming projects. The employee may then choose to relocate for the job.

⁵ The parties have stipulated, and I find, that Tokatch and Brandonio are supervisors within the meaning of Section 2(11) of the Act in that they have the authority to assign work and to hire, fire and discipline employees, or to effectively recommend such actions.

⁶ The Fayette County SCI project is still under a one-year warranty.

⁷ The Employer had submitted a bid on October 22, 2002, for the Information Sciences and Technology Building at Penn State University located in Centre County, but it was not awarded the contract.

As to the Forest County SCI, the Employer must complete certain items set forth on a so-called "punch list." In addition, the Employer may be awarded other painting work on the jail cells. Finally, the Employer may be called upon to perform warranty work.

A. Forest County SCI Punch List

At the opening of the hearing on March 19, 2003, the Employer's President estimated that the Employer had completed 95 percent of its work at the Forest County SCI. Accordingly, the Employer's painting crew at the project had been reduced from its peak of 14 or 15 painters to 6 or 7 painters when the hearing opened.

The record further disclosed that when the work of a contractor on the project is near completion, the project's architect and engineer inspect the contractor's work in order to generate a "punch list." The punch list is a work list of the deficiencies, repairs and corrections that have to be completed to achieve final completion. The architect and engineer also assign a dollar value to the work on the punch list, and that value is then multiplied by 1.5.

The Forest County SCI project is under the overall direction of a construction manager, O'Brien Kreitzberg/DMJM. As construction manager, O'Brien Kreitzberg/(DMJM) is responsible for the maintaining the budget, scope, quality and scheduling of the whole project. O'Brien Kreitzberg/DMJM employs a Project Controls Manager, Derek Oberlander, who has served as its contact person with the contractors on-site.

In his capacity as Project Controls Manager, Oberlander advised the Employer, by a letter dated March 24, 2003, that the punch list was to be completed by May 15, 2003. In addition, Oberlander's letter advised the Employer that based on the assigned value of the work on the punch list (\$318,000), with the 6 painters the Employer then had on-site, it was estimated that it would take 173 days to complete the painting.

Oberlander testified that a similar letter was sent to each contractor on-site in order to encourage them to complete their work in a timely manner. He explained that, notwithstanding the May 15 completion date referenced in the letter, it was the expectation of the construction

manager that the project, in its entirety, would be completed by April 30, 2003. Although the earlier completion date of November 2002 was not met, Oberlander testified that if the contractors on-site were not able to meet the April 30 completion date, then other contractors would be hired to perform the work.

Oberlander further testified that he calculated the 173-day figure in the letter by assuming a labor cost of \$40 per hour, per 8-hour day, for 6 painters and dividing the total assigned value of the punch list, \$318,000, by that number. He further testified that he would have assigned the work remaining on the punch list a much lower value than was assigned by the architect and engineer. He believed that the value of the remaining work was only \$60,000 to \$70,000, based on the Employer's original cost of specific items. In this regard, he noted that the Employer's original contract was for \$516,000 and as of February 21, 2003, approved payments to the Employer had exceeded \$439,000. Based on his estimates, he further believed that the work could be completed in about 36 days.⁸

Oberlander further testified that using the assigned values on the punch list, rather than his own lower estimate, he estimated that at the time of the resumed hearing on April 4, 2003, the value of the remaining work on the punch list was \$250,000. That is, between the March 24 letter and the April 4 hearing, the amount of work on the punch list was reduced from \$318,000 to \$250,000, or \$68,000. In other words, in 11 calendar days, the Employer had completed 21 percent of the remaining work.

B. Forest County SCI Jail Cell Work

In addition to the completion of the punch list, the Employer may be awarded additional work painting jail cells at the Forest County SCI project.

⁸ When Oberlander testified, counsel for the owner (Department of General Services) was present in the hearing room. The Petitioner argued that the presence of the representative of the owner caused the Oberlander to lower his estimate of the amount of work remaining in order to bring it into conformity with the owner's expectations.

The record disclosed that Oldcastle Precast Modular Group (Oldcastle) was the prime contractor for the pre-cast modular cells on the Forest County SCI project. These cells require painting of the grout joints and the doorways. Oldcastle had originally subcontracted this work to the Employer for \$16,000. However, the scope of the project had changed substantially in that, instead of the Employer performing the preliminary patching work, Oldcastle had performed the preliminary patching work itself. Therefore, at the time of the resumed hearing on April 4, 2003, the Employer was in the process of providing a new, lower quote to Oldcastle for the remaining jail cell painting. The Employer's President testified that if awarded this work, the Employer intended to complete it by April 30, 2003.⁹

C. Forest County SCI Warranty Work

Finally, in addition to the work remaining on the punch list, and the possible award of the jail cell painting work from Oldcastle, the Employer may be called upon to perform work under its one-year warranty at the Forest County SCI.

As noted, the Employer had performed the painting work at the Fayette County SCI, and the one-year warranty on that project commenced about August 2002. Since then, the Employer had a foreman and a single painter performing warranty work for two days in mid-March 2003, and expected to have another day or two of warranty work.¹⁰

⁹ Although subpoenaed by the Petitioner, the principal of Oldcastle did not appear at the hearing and the Petitioner's counsel made an offer of proof. The Petitioner did not request enforcement of its subpoena, stating that it left that determination to the Region's discretion.

The absence of this witness did not prejudice the Petitioner since the Petitioner was able to elicit the relevant facts from the documentary evidence and from admissions from the Employer's President. Because the record contains sufficient evidence regarding the relationship between the Employer and Oldcastle, enforcement of the subpoena is not necessary.

¹⁰ Other work performed at the Fayette County SCI after August 2002 was punch list work and damage repair work, rather than warranty work.

III. ANALYSIS

In the instant case, the record evidence affirmatively establishes that other than work related to the Forest County SCI project, within the petitioned-for 32-county area, the Employer has no current bids pending, is not working on any bids to submit, has no work that is under contract but not yet started, has no work that it is negotiating with an owner or another contractor to perform and is not aware of any future work of the type it typically performs. Further, the evidence affirmatively establishes that the Employer's remaining work on the Forest County SCI project is limited to completion of the items on the punch list, and any required warranty work. In addition, the Employer may be awarded certain work related to painting the jail cells.

The record reveals that there were conflicting estimates as to how long it will take the Employer to complete the punch list, ranging from 36 days as of April 4, 2003, to 173 days as of March 24, 2003. Under the circumstances present in this case, it appears that the actual completion date will be closer to the 36-day estimate.

The longer 173-day estimate was based on the \$318,000 value assigned to the remaining items on the punch list by the project's architect and engineer. This figure was divided by the hourly labor cost (\$40), the hours worked per day (8 hours) and the number of painters on-site (6 painters). However, the amount of work completed on the project between the date of the estimate and the date the hearing resumed demonstrates that this formula is unreliable.

Thus, between March 24 and April 4, 2003, the value of the remaining items on the punch list decreased from \$318,000 to \$250,000, or \$68,000. Using the formula used to calculate the longer number of days, the amount of time to complete that much work would be 35 days.¹¹ In fact, however, only 11 days had elapsed. Thus, the formula generated a number

¹¹ \$318,000 minus \$250,000 equals \$68,000. \$68,000 divided by \$40 per hour times 8 hours per day times 6 painters equals 35 days.

of days that was three times longer than what really was required. Therefore, the estimate of 173 days may very well be three times the actual time required to complete the punch list. Indeed, applying the actual amount of work completed in 11 days to the 35 days expected using the formula, the remaining work could be completed in 54 days instead of 173 days.¹²

Further, for purposes of this decision only, it will be assumed that the Employer will be awarded the work of painting the jail cells by Oldcastle. This work is relatively minor, having a value of less than \$16,000. The time required to perform this work, then, would not expand the scope of the Employer's work appreciably, and would be subject to the same completion deadline.

Although the calculations set forth above show that the Employer may have required up to 54 days from March 24, 2003 to complete the project, the unequivocal testimony from the representative of the construction manager was that the project, in its entirety, would be completed by the contractors on-site, including the Employer, by April 30, 2003, or that other contractors would be hired to finish the work.

Finally, a determination that the Employer will be required to perform warranty work at the Forest County SCI of such a degree as to warrant an election would be speculative. The fact that the Employer had been called upon to perform warranty work at another similar construction project cannot support such a determination. Indeed, the record shows that the warranty period on the Fayette County SCI is two-thirds completed, and that the Employer's time and manpower on that warranty work has been negligible.

There have been numerous Board decisions establishing that, where an employer's operations are scheduled to terminate within 3 to 4 months, no useful purpose is served by directing an election. See Davey McKee Corp., 308 NLRB 839 (1992), citing: M.B. Kahn Construction Co., 210 NLRB 1050 (1974); General Motors Corp., 88 NLRB 119 (1950); Todd-

¹² Eleven days divided by 35 days, times 173 days, equals 54 days.

Galveston Dry Docks, 54 NLRB 625 (1944); Fraser-Brace Engineering Co., 38 NLRB 1263 (1942); and Fruco Construction Co., 38 NLRB 991 (1942). In the instant case, it cannot be concluded that the Employer's work in the petitioned-for 32-county area will continue for a period of time sufficient to warrant an election.

In considering this matter, I am mindful that the Board has recognized that, in appropriate circumstances, an election may proceed even in the absence of committed future work. Thus, in Fish Engineering & Construction, 308 NLRB 836 (1992), the employer therein had a history of four past projects, had two current projects and had a pending bid for the same company with which it was currently under contract. Based on the evidence of the employer's substantial history of past and current work, and its bidding on future work, the Board directed an immediate election.

In contrast, in the instant case, the Employer has completed two projects in the 32-county area, is nearing completion on a third project, has no committed work in the 32-county area and has no projects under bid in this area. Moreover, the record establishes that the Employer is not dependent on work in the 32-counties, but has performed work from New Jersey to Nebraska, and its decision to bid on work appears to be driven more by the type of project, large commercial/public projects, rather than the location of the project. The Employer is not aware of any large commercial/public jobs of the type it usually performs arising in the future in the area, and the record discloses no evidence of such jobs. Thus, unlike the employer in Fish Engineering, it cannot be concluded that the Employer herein will perform work in the petitioned-for area in the reasonably foreseeable future.

Based upon all of the foregoing facts and circumstances and the record as a whole, I hereby conclude that it would serve no useful purpose to conduct an election at this time. I shall, therefore, grant the Employer's motion and dismiss the petition in this matter.¹³

¹³ Under the circumstances of this case, I find it unnecessary to resolve the other issues raised by the parties. In the event that the Forest County SCI project remains in existence for a

IV. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officers' rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

V. ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

substantially longer period of time than is now anticipated, or should the Employer acquire additional projects in the petitioned-for geographic area, the Petitioner will have the opportunity to file a motion to reinstate the petition, and the other issues raised herein may be resolved at that time.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST (EDT), on **May 9, 2003**. The request may **not** be filed by facsimile.

Dated: April 25, 2003

/s/ Michael C. Joyce

Michael C. Joyce, Acting Regional Director

NATIONAL LABOR RELATIONS BOARD
Region Six
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Classification Index
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